

Prem Kumar Vs. Ved Parkash and ors.

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Court : Delhi

Decided On : Feb-12-1993

Reported in : 49(1993)DLT695

Judge : P.N. Nag, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

Appeal No. : Regular Second Appeal No. 77 of 1976

Appellant : Prem Kumar

Respondent : Ved Parkash and ors.

Advocate for Pet/Ap. : R.K. Saini and; Sanjay Shangari, Advs

Judgement :

P.N. Nag, J.

(1) This regular second appeal is directed against the judgment and decree dated 4.2.1976 passed by Shri Jaspal Singh, Additional District Judge, Delhi (as he then was) whereby he has allowed the appeal and set aside the judgment and decree dated 30.4.1974 passed by Shri GopalKrishan, Sub-Judge 1st Class, Delhi and dismissed the suit.

(2) The appellant-plaintiff filed a suit for declaration to the effect that the property No. WZ-61, Mahabir Nagar, New Delhi vested in the entire body of legal heirs of deceased, Shri Malik Chand. He claimed that the plaintiff and defendants 1, 3 to 5 are the children of Shri Malik Chand and defendant No. 2 is his widow. The plaintiff's father Shri Malik Chand had purchased one plot of land No. 47, 'measuring 200 sq. yards in MahabirNagar, New Delhi in the benami name of defendant No. 1, i.e., Shri VedParkash, out of his own earnings and thereafter constructed a house thereon bearing the aforementioned house No. WZ-61 and also enjoyed the profits thereof throughout his life. Defendant No. 1 is not the real owner of the property as he could not purchase the plot and raised construction thereon. In the year 1954, when the plot in question was purchased and construction raised thereon, defendant No. 1 was only a student, and had no source of income and was only a minor of 13 years. Since Shri Malik Chand had died without a Will, the plaintiff along with the defendants had become joint owners as the legal heirs of said Shri Malik Chand and defendant No. 1 exclusively could not be the owner of the property.

(3) Defendant No. 1 contested this suit and denied that his father had purchased the plot or raised constructions thereon from his own earnings. According to him, the plot was purchased by him from his own savings and construction had been raised thereon by him with the assistance of his late uncle Shri Wazir Chand, who was issueless. Being the eldest child of his parents and his uncle being issueless, defendant No. 1 used to get pocket money from his parents and uncle and from those savings he purchased the plot and raised construction thereon. Defendants 2 to 5 supported the case of the plaintiff.

(4) One of the relevant issues framed in the suit was. Issue No. 2, which reads as under :

'2. Whether Shri Malik Chand, father of the plaintiff purchased the plot in question in the Benami name of defendant No. 1 vide sale deed dated 20.7.1954 as detailed in para 2 of the plaint? OPP'

(5) The learned Trial Court after scrutinizing the evidence, vide this Judgment dated 30.4.1974, held that the property was purchased by Shri Malik Chand in the

name of defendant No. 1 and the sale deed dated 20.7.1954 which is Ext. D 1 is benami in the name of defendant No. 1. The Trial Court, therefore, decreed the suit. However, this judgment was set aside by the learned appellate Court in appeal vide order dated 4.2.1976, which is under challenge in this regular second appeal.

(6) What should be the standard proof and on whom onus and proof of determining whether or not a particular transaction of transfer of property was a Benami sale was considered by the Supreme Court in *Jaydayal Poddar (Deceased) through L.Rs. and Another v. Mst. Bibi Hazra and Others*, AIR 1974 SC 170. In that case, the Supreme Court has explained in Para 6 as under:

'6. It is well settled that the burden of proving that a particular sale is Benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a Benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be Benami of any part of the serious onus that rests on him; not justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favor that the apparent state of affairs is the real state of affairs. Though the question whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances:

(1) the source from which the purchase money came;

(2) the nature and possession of the property, after the purchase; (!) motive, if any, for giving the transaction a Benami colour;

(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(5) the custody of the title-deeds after the sale and

(6) the conduct of the parties concerned in dealing with the property after the sale. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, viz., the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.'

(7) Similar view has also been expressed by the Supreme Court in *Bhim Singh (dead) by L.Rs. and Another v. Kan Singh*, : [1980]2SCR628 .

(8) In case the present appeal is examined in the context of the law laid down by the Supreme Court I am of the considered opinion that the plaintiff has failed to substantiate his case that the sale in favor of defendant No. 1 is only Benami. In fact the learned appellate Court has, after appreciating evidence in the right context, has correctly come to this conclusion that the plaintiff has failed to prove that the sale in favor of respondent No. 1 was Benami. There is no dispute that the sale deed of the plot in question has been effected in the name of the defendant No. 1. No documentary evidence has been led to prove by the plaintiff to show that the payment of the consideration money for the purchase of the plot has been paid by Shri Malik Chand nor has he stated in his testimony that the consideration was paid by his father in his presence. It has further not been proved by documentary evidence or otherwise satisfactorily that after the purchase of plot the construction was raised by Shri Malik Chand. It has also been revealed during the course of evidence that Shri Malik Chand, the father of the plaintiff, had a bank balance of Rs. 1,100.00, Rs. 1,200.00 and no attempt whatsoever has been made by the plaintiff to demonstrate that Shri Malik Chand withdrew the money from the bank for the purchase of the plot or for the construction thereon. Furthermore, the case set up by the plaintiff-appellant is that the plot was purchased and building constructed by his father with a view to benefit him. However, no tenant has been examined and no document has been placed on record to show that he had let out the building and recovered the rent from the tenants.

(9) It has been further revealed from the cross-examination of the plaintiff that Shri Malik Chand had filed the eviction petition and after his death, the appellant-plaintiff had made an application to be made party as one of the L.Rs. but that application has not been placed on record. Above all Shri Malik Chand never disclosed to anybody, during his life time, that the property in dispute was Benami nor any evidence produced to show that his father had purchased the property as Benami.

(10) The appellant Court has discussed all such pieces of evidence, amongst others, and has rightly come to the conclusion that the burden of proof that the sale was Benami has not been properly discharged by the plaintiff as is clearly laid down by the Supreme Court in Jaydayal Poddar (Deceased) through L.Rs. and Another (supra) that the burden of proving that a particular sale is Benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. therefore, no interference is called for in this appeal.

(11) Even otherwise, the learned appellate Court has, after appreciation of evidence, come to the conclusion that the transaction of sale in favor of defendant No. 1 was not Benami and such finding essentially in the present facts and circumstances of the case, is a finding of fact. At the cost of repetition in Jaydayal Poddar (Deceased) through L.Rs. and Another, (supra) the Supreme Court has laid down whether or not a particular sale is Benami, is largely one of fact. therefore, under Section 100 of the Code of Civil Procedure the Court cannot interfere with a finding of fact.

(12) With the result, the appeal fails and has to be dismissed accordingly.

(13) However, I may note down the submissions of Mr. Saini, learned Counsel for the appellant, that defendant No. 1 could not purchase the property in dispute and raise construction thereon as at the time of the transaction in 1954 he was only a student, a minor aged 13 years. The learned appellate Court has rightly held that his late uncle Shri Wazir Chand, who was issueless and being the eldest child of his parents, defendant No. 1 used to get pocket money from his parents and uncle

and from those savings he purchased the plot and raised construction thereon. Mr. Saini has tried to assail the judgment by pointing out that it has not been proved on record by defendant No. 1 that the defendant No. 1 has purchased the plot and raised construction thereon. In this context, it is only sufficient to say that in the context of the law laid down by the Supreme Court, the plaintiff was to establish his case and place sufficient material to substantiate his case to the effect that the plot was purchased and building constructed thereon by Shri Malik Chand and the burden of proof that a particular sale was Benami was on him and not on defendant No. 1 and the learned appellate Court has rightly come to the conclusion which is essentially a finding of fact.

(14) Mr. Saini next contended that some will was executed by Shri Malik Chand in which there is a recital that the plot in question was purchased by him in the name of defendant No. 1, his son. This document has neither been proved nor exhibited and cannot be looked into and in the absence of which this contention cannot be accepted.

(15) In view of the above discussion, the appeal fails and is dismissed with no order as to costs.